

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1109

To be argued by
RICHARD F. LAWLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1109

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND ERNEST RICARD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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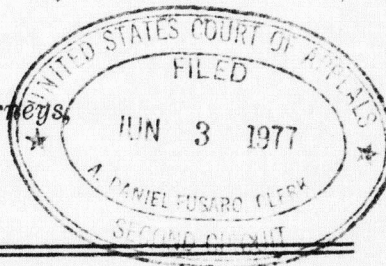


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FOR THE SECOND CIRCUIT

Docket No. 77-1109

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND ERNEST RICARD,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raymond Ernest Ricard appeals from a judgment of conviction entered on February 23, 1977, in the United States District Court for the Southern District of New York, after a trial before the Honorable Thomas P. Griesa, United States District Judge, sitting without a jury.

On August 19, 1976, an Information was filed (76 Cr. 776) charging Ricard with obstructing the passage of the mail by taking two books of money orders from the mail in violation of 18 U.S.C. § 1701. On October 5 and 6, 1976, a suppression hearing was held before Judge Griesa and Ricard's motion to suppress physical evidence was denied. On December 14, 1976, a superseding indictment (S 76 Cr. 776) was filed in two counts charging violation of 18 U.S.C. § 1708 (Count One) and § 1701 (Count Two). The trial took place on December 21, 1976,

at the conclusion of which the Court found Ricard guilty on Count One. No evidence was introduced as to Count Two, and it was dismissed by the Court.

On February 23, 1977, Judge Griesa sentenced Ricard to two years imprisonment, six months to be spent in jail and the remainder suspended with the defendant placed on probation for a period of eighteen months. Ricard is at liberty pending the outcome of this appeal.

Statement of Facts

A. The Suppression Hearing

On October 5 and 6, 1976, at a hearing before Judge Griesa, Ricard moved to suppress physical evidence seized from him at the time of his arrest. On direct examination, Ricard testified that he had been stopped on the New Jersey Turnpike while travelling from New York to Philadelphia. (H. Tr. 4).^{*} When the state trooper, who did not identify himself, had asked him if he knew why he was being stopped, he had stated, "I guess because I was speeding". (H. Tr. 4). After checking his license the state trooper ordered Ricard out of the car and gave him a pat-down search. When asked by the trooper what was in left jacket pocket, Ricard said "I don't know. There is nothing here". (H. Tr. 5). The trooper then asked him to empty that pocket and he refused, telling the trooper to take out what was in the pocket himself. The trooper then pulled out an aluminum foil packet containing cocaine. (H. Tr. 6). In this same pocket, Ricard said that he had the stolen money orders, though these were not discovered until he was searched at the police station. (H. Tr. 7).

^{*} Citations to "H. Tr." refer to pages in the transcript of the hearing held on October 5 and 6.

On cross-examination, Ricard said that the cocaine had been in a roll approximately 9 inches long. (H. Tr. 10). He denied saying anything to the trooper after being stopped, though he did confirm telling the trooper that nothing was in his pocket when there was in fact something there and he repeated that he had told the trooper to take the item out of the pocket himself. (H. Tr. 11). Ricard also stated that the first time he had been advised of his constitutional rights was in the police station after the money orders had been found. (H. Tr. 13).

The Government called Thomas D. Kelleher, a New Jersey State Police Officer. He had observed Ricard travelling west on the New Jersey Turnpike at approximately 75 miles per hour on March 13, 1976, and stopped him for speeding (H. Tr. 16). Trooper Kelleher said that Ricard got out of his car and met him at the rear of his vehicle. Ricard told Trooper Kelleher that he knew he had been speeding but stated that he was a postal carrier and asked for leniency. As Ricard was pulling out identification, he observed a tin foil packet ride up from inside his pocket. He asked Ricard what the packet was and was told it was "nothing". (H. Tr. 17). Trooper Kelleher suspected the packet contained a drug and he took it from Ricard's pocket, opened it and found a white crystalline powder. Trooper Kelleher then placed Ricard under arrest for violation of the narcotics laws. After handcuffing Ricard, Trooper Kelleher advised him of his rights. Ricard was then brought to police headquarters where he was strip-searched in the detention cell, following normal procedures, prior to processing. At this time, the two money order books underlying the indictment were found. In response to a question by Trooper Kelleher, Ricard said that he was going to drop off the money orders and cocaine in Philadelphia and that he had received them from a man on the street in New York. (H. Tr. 17, 18).

The hearing continued the next day when Santiago Castro Negron, a friend of Ricard who was a passenger at the time of the arrest, testified that Ricard had shown the state trooper his documents from inside the car. After checking the documents, the trooper told Ricard to get out of the car and had searched him. After the search Ricard was handcuffed. Mr. Castro said that to his knowledge Ricard kept his identification in his pants pocket. (H. Tr. 41). On cross-examination, Mr. Castro said that he did not speak any English and that he did not know what was in Ricard's pockets. (H. Tr. 43, 44).

Trooper Kelleher was recalled by the Government and testified that he had spoken with Mr. Castro at the time of the arrest and the conversation had been entirely in English. (H. Tr. 48). In response to questioning by the Court, Trooper Kelleher said that if he had not seen the foil packet he would simply have issued Ricard a summons and not arrested him. (H. Tr. 51).

Ricard was recalled to testify that he had acted as translator for Mr. Castro when he was being questioned by Trooper Kelleher. (H. Tr. 53).

In denying Ricard's motion to suppress, the Court found that the issue was one of credibility. The Court held that Ricard had been stopped while speeding and in reaching inside his pocket he had exposed a tin foil packet. Ricard said the packet was nothing. The state trooper suspected it contained narcotics and took it out of Ricard's pocket. (H. Tr. 68-69).

B. The Pre-Trial Conference

On December 15, 1976, Judge Griesa called a pre-trial conference to resolve a question as to whether Ricard's attorney (John Curley, Esq.) had been notified of the trial date.

The Court Clerk stated that he notified the Government of the trial date "at the beginning of December". (Dec. 15 Tr. 2).

The Assistant United States Attorney, Jane Parver, stated that approximately one week earlier she had asked Mr. Curley if Ricard was prepared to go to trial. Upon receiving an affirmative answer, Ms. Parver said she informed Mr. Curley that the Government was filing a superceding indictment. (Dec. 15 Tr. 3). Mr. Curley stated that on December 8, 1976, he had informed his client by letter of the superceding indictment. He received a copy of the superceding indictment on December 15, 1976.

Assistant United States Attorney Parver told the Court that the original Information had been filed by another Assistant United States Attorney but that when she reviewed the file and learned that each of the 39 money orders could be negotiated for up to \$200 a piece, she believed that the facts warranted bringing of a charge under 18 United States Code section 1708. (Dec. 15 Tr. 7, 8).

C. The Trial

The Government's first witness was Trooper Kelleher. His testimony basically reiterated what he had stated in the suppression hearing. (Tr. 5-23).*

Robert G. DeMuro, a United States Postal Inspector, questioned Ricard on March 30, 1976, concerning the money orders found in his possession. After being advised of his rights, Ricard had said he found the money orders in the back of mail truck while on duty on March 13, 1976. He said that he did not turn them in right

* Citations to "Tr." refer to pages in the trial transcript.

away because he had an accident and was forgetting things. (Tr. 27). Subsequently, Ricard wrote out a statement setting forth the same story. (Tr. 29; GX 8).

It was stipulated that the money orders had been mailed; had not been received by the addressee; and had been found in the possession of the defendant. (Tr. 3; GX 21, 22, 23).

Ricard did not offer any evidence.

D. The Court's Decision

The Government did not attempt to prove Count Two of the Indictment and accordingly Count Two was dismissed by the Court (Dec. 21 Tr. 65).*

The Court found Ricard guilty on Count One. In its finding of facts the Court found that the money orders had been stolen; that they were found in the defendant's possession; and that he knew they were stolen rather than merely lost or misplaced. (Tr. 66-67).

* In preparing the case for trial the Government explained that its original theory of the case changed. Since Ricard was a postal carrier and the money orders were to be delivered in an area that was thought to be covered by his post office, it was assumed that he had come in contact with them through his work in the post office. Hence the Government charged him with obstruction of the mail, in addition to possession of stolen mail. However, prior to trial it was learned that the money orders were mailed first class and thus should have been delivered through another post office station where Richard would not have had access to them through his work as a postal employee. (Tr. 56).

ARGUMENT

POINT I

The Superseding Indictment Was Properly Filed.

Relying upon *North Carolina v. Pearce*, 395 U.S. 711 (1969), and its progeny, and in particular upon *Blackledge v. Perry*, 417 U.S. 21 (1974), Ricard claims that the filing of an indictment superseding the charges contained in an initial information deprived him of Due Process. This claim misconceives both the operative facts and the underlying law.

The record shows that the Government was informed by the Court's Clerk sometime at the "beginning of December" that the trial was scheduled for December 20, 1976. No later than December 8, 1976, the Assistant United States Attorney then in charge of the case inquired of defense counsel if Ricard was going to trial. When told that he was, she informed him of the superseding indictment. (Dec. 15 Tr. 3). As the explicit reason for filing the new indictment, she informed the Court and counsel that she had not been responsible for filing the original information, and after she reviewed the file she had decided that the gravity of the offense warranted the charge of possession of stolen mail. (Dec. 15 Tr. 6, 7).

It is clear from the record that when the Assistant inquired of defense counsel as to whether the defendant was going to trial, she was doing so in order to know whether it would be necessary to bring a superseding indictment. There simply was no overt or implied threat in her question. (Dec. 15 Tr. 3). Ricard was not told that only if he went to trial would he face indictment on a felony charge, or that if he were to plead guilty he would necessarily be allowed to plead to the lower charge.

Pearce, Blackledge and the other cases upon which Ricard relies hold that once a trial has occurred, neither the prosecutor nor the court may "chill" the defendant's right to appeal—or other protected rights—by "upping the ante," either in the form of increasing the charges he faces or imposing a higher sentence. This case differs in numerous significant respects, none of which is even acknowledged in Ricard's brief. First, the superseding indictment was filed well prior to trial. During this phase of criminal proceedings, unlike during the pendency of an appeal, some shift in the position taken by the Government is traditional and occasionally necessary. Frequently, for example, discovery of new facts after the filing of the first charges will reveal a wider scope of conduct; or, as here, re-examination of the facts already discovered will prompt reconsideration of the charges most appropriate to those facts.

Second, unlike the cases upon which Ricard relies, in this case the prosecutor immediately explained her reason for superseding the original charges, noting that when she had received the case from another attorney she had discovered that the magnitude of the offense was actually considerably greater than had first appeared. (Dec. 15 Tr. 7). As the Supreme Court noted in *North Carolina v. Pearce, supra*, the due process clause does not provide an absolute prohibition upon increased charges or sentences; rather, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U. S. at 726. Since the Assistant United States Attorney offered a candid explanation for the superseding indictment as soon as the matter was brought to the attention of the Court, the cases upon which Ricard relies are wholly inapposite.

Finally, Ricard's position would lead to entirely unwarranted and untenable results. First, of course, it would preclude the filing of superseding indictments in

any case where the defendant indicates that he will go to trial. As this Court has noted in rejecting a claim similar to that made by Ricard, "the *raison d'être* of the prosecutor [is] to punish criminal behavior." *United States v. Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). Particularly in the absence of any showing of prejudice to the defendant, and also when an explanation for the superseding indictment was given, Ricard's position would mean that no matter what new developments arose after the first charges were filed, the prosecutor would be powerless to charge the defendant with them.* Second, Ricard's position would preclude plea bargaining. Any time the Government agrees to accept a plea to less than the maximum number of charges it could bring against the defendant, it is essentially giving up its right to prosecute on the additional charges in return for the defendant giving up his right (among others) of going to trial. In Ricard's view, apparently any insistence by the Government upon any charges greater than that to which the defendant is willing to plead guilty would necessarily "chill" his right to go to trial in precisely the manner he asserts here.** The

* Indeed, this case demonstrates one instance where a bar upon superseding indictments would have allowed the defendant to escape conviction altogether. As Judge Griesa noted, the theory upon which the initial information was filed was a faculty one, and Count Two of the superseding indictment, which incorporated those charges, was dismissed at the close of the Government's case. (Tr. 66). Had the law been what Ricard now contends, he would have totally avoided the criminal penalties of which he is now convicted. Cf. *Blackledge v. Perry*, *supra*, 417 U.S. at 29, n. 7.

** This argument serves to underscore the fact that nowhere in the record does it appear that the initial information charging a violation of 18 U.S.C. § 1701 was filed with an understanding that Ricard would plead guilty to it. Thus, the key contention in Ricard's brief—that the prosecutor increased the charges in order to penalize Ricard's decision to go to trial—is factually erroneous, since nothing indicates that the prosecutor ever thought Ricard was *not* going to trial.

Supreme Court has, of course, rejected this analysis. *North Carolina v. Alford*, 400 U.S. 25 (1970).

In short, Ricard's claim is without merit. Indeed, Ricard is in effect attempting to penalize the Government for the courtesy of informing him of its intention to file the superseding indictment. Had the Government simply filed the second set of charges without informing him, his present charge would evaporate, although the effect would have been to give Ricard less time to prepare for trial.

POINT II

The Seizure of the Money Order Books Was Proper.

Ricard now argues that Trooper Kelleher lacked sufficient probable cause to justify the seizure of the cocaine found on him, and that this improper arrest led to the discovery of the money orders underlying his conviction. Ricard's express disavowal of the theory he has espoused on appeal precludes his claim; at any rate, the seizure of the cocaine was proper under any one of three independent theories.*

At the hearing on the motion to suppress, the first witness to testify was Ricard himself. His assertion was that Kelleher searched him for the cocaine prior to asking for identification and prior to seeing the tin foil package of cocaine. (H. Tr. 4). Trooper Kelleher then testi-

* Ricard cannot—and does not—dispute that once Officer Kelleher found the cocaine he was entitled to arrest Ricard immediately, and subsequently search him. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Edwards*, 415 U.S. 800 (1974). Thus, the only issue conceivably raised on appeal is the propriety of the police officer's conduct up to the time of the discovery of the cocaine.

fied that, in fact, he asked Ricard for identification prior to any physical contact with him, and noticed the tin foil package when Ricard was reaching for his papers (H. Tr. 17), at which time Ricard gave the elusive answer that the package was "nothing."

Following the testimony of Officer Kelleher, Mr. Curley, the attorney for Ricard, noted that he wished to call another witness on the motion to suppress. After extended legal discussion, the following colloquy ensued:

[THE COURT:] Now, isn't there probable cause to seize the cocaine, seize the foil if you see the foil?

Let us assume that I believe Mr. Kelleher. That is that he was simply doing whatever he was doing and that when Ricard was trying to explain and get leniency that Ricard was reaching into his pocket. Let us assume that I believe that. And that this foil package rode up and then but it was seen, okay?

Now, wouldn't that be probable cause to seize the foil package?

MR. CURLEY: I believe so, your Honor.

THE COURT: And do you think it is a question of credibility and that is why you want to put on your witness?

MR. CURLEY: Yes, your Honor.

THE COURT: I will permit you to do that.
[Tr. 36-37]

Thus, Ricard expressly conceded the precise issue he is now attempting to raise in this Court. As the Court has recently noted,

The law in this Circuit is clear that where a party has shifted his position on appeal and ad-

vances arguments available but not pressed below, *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), and where that party has had ample opportunity to make the point in the trial court in a timely manner, *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 819 (1976), waiver will bar raising the issue on appeal.

United States v. Braunig, Dkt. No. 76-1448, slip op. 2773, 2779-80 (2d Cir., April 11, 1977); see also *United States v. DiStefano*, Dkt. No. 76-1581, slip op. 3539, 3548 n.5 (2d Cir., May 16, 1977). That is precisely the situation here. Ricard explicitly noted to Judge Griesa that the issue was one of credibility, and that if Trooper Kelleher were believed, then probable cause existed to seize the cocaine package. Since Judge Griesa expressly resolved the issue of credibility against Ricard, after hearing the additional witness, Ricard cannot (and does not) contend that his factual resolution was "clearly erroneous." *United States v. Pastor*, Dkt. No. 76-1364 slip op. 3633, 3638 (2d Cir., May 19, 1977); *United States v. Lucchetti*, 533 F.2d 28, 36 (2d Cir.), *cert. denied*, 97, S. Ct. 136 (Oct. 4, 1976). It follows that he cannot raise the legal issue he waived below.

In addition, the seizure of the cocaine (and thus the arrest and subsequent discovery of the money orders) was entirely proper; indeed, it was so for a number of reasons. First, under New Jersey state law, Trooper Kelleher was fully entitled to arrest Ricard for violating the traffic laws by traveling at 75 miles per hour in a 55 m.p.h. zone. N.J.S.A. 39:5-25; *State v. Padavano*, 81 N.J. Super 321, 195 A.2d 499 (1963). "Defendant does not deny that N.J.S.A. 39:5-25 gives a police officer the authority to arrest without a warrant any person who, in the presence of the officer violates the motor vehicle Act." *Id.* at 501. See also *State v. Boykins*, 50 N.J. 73, 232 A.2d 141, 142 (1967). As this Court has

noted on several occasions, once probable cause to arrest exists, an officer may constitutionally perform a full search incident to such an arrest, even if he has not in fact first placed the miscreant in custody. *United States v. Riggs*, 474 F.2d 699, 702 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973); *United States v. Jenkins*, 496 F.2d 57, 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); see also *United States v. Panebianco*, 543 F.2d 447, 456 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1129 (Feb. 22, 1977). That is precisely the situation in this case.*

Secondly, as Ricard correctly perceived at trial, the facts known to Trooper Kelleher fully justified his actions. The propriety of stopping a speeding car and asking for identification papers is obvious, and is not challenged by Ricard. Equally obviously, under the version of facts credited by Judge Griesa, Trooper Kelleher actually saw the foil packet of cocaine without making the slightest intrusion when Ricard reached for his papers. Since the packet was "in plain view," *United States v. DiStefano*, *supra*, slip op. at 3549-50; *United States v. Montiell*, 526 F.2d 1008, 1010 (2d Cir. 1975), and cases there cited, it permissibly provided the basis for Officer Kelleher to seize it. Certainly, the observation of the tin foil package,** together with Ricard's evasive response

* The fact that Trooper Kelleher stated that he did not subjectively intend to place Ricard under arrest (H. Tr. 50) is immaterial for the purposes of the Fourth Amendment. See *United States v. Robinson*, *supra*, 414 U.S. at 236. In a companion case to *Robinson*, the Court noted that a valid search may take place after detention for a traffic incident even though neither police regulations nor traditional procedure required a "field arrest." *Gustafson v. Florida*, *supra*, 414 U.S. at 265.

** Trooper Kelleher was explicit that he seized the foil package because he believed, on the basis of his observations up to that point, that it contained drugs.

to the question about it * and the fact that he was speeding in the first place were "sufficient in themselves to warrant a man of reasonable caution" in the belief that "an offense had been committed."** *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

And finally, under this Court's decision in *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), and cases there cited, the response of Trooper Kelleher was entirely restrained in relation to the facts confronting him. As this Court and the Supreme Court have observed, an important consideration in determining the reasonableness of a police officer's conduct is "the scope of the particular intrusion, in light of all the exigencies of the case . . ." *United States v. Magda*, *supra*, 547 F.2d at 759, quoting from *Terry v. Ohio*, 392 U.S. 1, 18 n.15 (1968). The degree of the intrusion by Trooper Kelleher was indeed minimal, since it consisted of nothing more than taking, upon invitation,*** the package he had al-

* The evasive response was similar to flight (or the appearance of flight), which has frequently been found a proper datum in determining whether probable cause exists. *United States v. Davis*, 458 F.2d 819, 822 (D.C. Cir. 1972); *United States v. Hines*, 455 F.2d 1317 1325 (D.C. Cir.), *cert. denied*, 406 U.S. 975 (1972); see also *United States v. Christophe*, 470 F.2d 865, 868-69 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

** As this Court has observed, a brown paper bag "has long been a sort of hallmark of the narcotics business," *United States v. Santana*, 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States v. Montalvo*, 271 F.2d 922, 924-25 (2d Cir. 1959). This is, of course, true *a fortiori* of tin foil packets carried in one's clothes while driving. In addition, as in *Santana*, Trooper Kelleher testified at trial that he had often seen narcotics carried in such packets. (Tr. 7).

*** Indeed, the facts here are virtually identical to those of *Magda* in this respect. In *Magda*, the officer stopped *Magda* upon a factual showing far weaker than that made here and asked him what he was doing. *Magda* replied, after first making an unresponsive answer, that he had a marijuana cigarette, which

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ready (and properly) seen. It follows that his actions were entirely proper.*

CONCLUSION

The judgment of conviction should be affirmed.

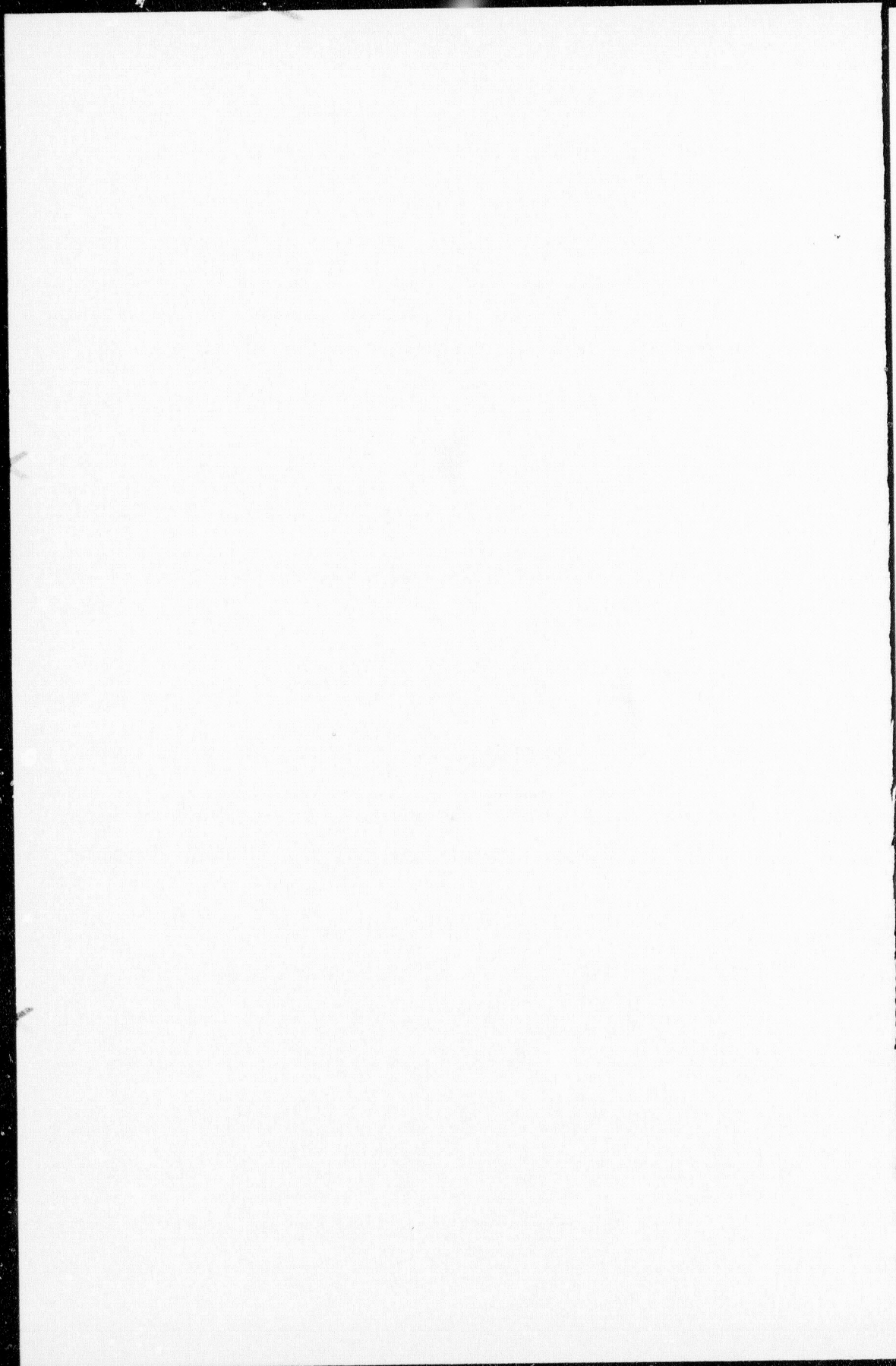
Respectfully submitted,

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he produced upon demand. 547 F.2d at 757. Here, Ricard himself testified that when Kelleher asked him for the package, Ricard told him to take it out himself. (H. Tr. 6). These facts were later repeated and emphasized under questioning from the Court. (H. Tr. 11).

* Ricard's reliance upon the Supreme Court's decision in *Sibron v. New York*, 392 U.S. 40 (1968), is misplaced. As that opinion explicitly noted, the arresting officer in that case did not see anything that even remotely could have been narcotics in the possession of the defendant. *Id.* at 62. The sole basis for the intrusion was the fact that he had been associating with criminal characters. Here, of course, Trooper Kelleher actually saw the package of what he (accurately) believed to be narcotics.



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